IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY LEE MYERS, Appellant.	No. 32782-1-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Jeremy Lee Myers appeals his convictions for first degree murder and conspiracy to commit first degree murder. We affirm.

FACTS

Jeremy Myers and Jessica Myers (Jessica) married in August 2001. The couple had one son, Alex, born in June 2003. On July 6, 2003, Jessica and Alex went to stay with Jessica's mother. Myers, a soldier, induced Jessica to stay with her mother on the pretense that he had been called out to "the field." 6 Report of Proceedings (RP) (Oct. 18, 2004) at 928. Myers did not, however, go into the field but stayed at their apartment.

In June 2003, before Jessica left to stay with her mother, Myers met and befriended a 15-

year-old girl, Sarah Benton. Benton lived in Las Vegas but was visiting her father in Washington for the summer. The day after Jessica left, Myers began a sexual relationship with Benton. Myers told Benton that he was going to get a divorce. The relationship continued until Benton had to return to Las Vegas for a doctor's appointment on July 13.

During his wife's absence, Myers appeared to be searching for a way to kill her. Police found that he had searched the internet for "hit men wanted" and "rat poison." 2 RP (Oct. 8, 2004) at 215, 218. In addition, Myers asked Amanda Elzner, Benton's best friend, if she knew anyone who would kill Jessica for him. He then offered Elzner $10,000 from Jessica's life insurance if she would help him do it. Benton also testified that Myers had told her that he was going to kill Jessica, although she did not take the threat seriously.

Myers was supposed to pick up Jessica and Alex on July 11, but he did not show up until July 13, the day Benton flew back to Las Vegas. Jessica quickly discovered Myers's relationship with Benton. In a July 14, 2003 journal entry, Jessica recorded that she discovered a love letter to Benton and that she had lost her temper. The police later found Jessica's journal in a locked briefcase in Myers's room. She also wrote that Myers asked her to wait two days before deciding whether to leave him.

The next day, on July 15, Christopher Baber, also a soldier, returned from visiting his family in Ohio. Because the army barracks was empty, he decided to stay with Myers and Jessica the night of July 15, spending the night on their couch. Baber testified at trial that he was part of an organization called the "Federation" and that Myers had recruited him into the organization. 10 RP (Oct. 25, 2004) at 1632. Baber believed that it was an organization intended to rid the

country of drug dealers and other bad people and that it had thousands of members. According to Baber, Myers, who was known as Commander Jeremy or C.J., was the head of the Federation in Washington State.

Myers's neighbors reported that after Jessica's return to the apartment, they heard yelling and fighting in Myers's apartment. One of the neighbors reported to police that she heard two male voices on the apartment's deck. One of the voices said that "he hated her" and that he wanted to "fucking kill her; he hated that bitch." 6 RP (Oct. 18, 2004) at 1022.

According to Baber's trial testimony, when he returned to Washington on July 15, Myers and Jessica were home and told him that the Federation had put a "hit" on Jessica, meaning that the Federation was going to kill her. 10 RP at 1670. Baber testified that Myers convinced Jessica and him that they should fake Jessica's death so the Federation would leave her alone. Myers convinced Baber that he had done the same thing before and showed him the movie "Spy Game"[1] to show it was possible. 10 RP at 1672.

Baber testified that they initially planned to have Jessica go to a local bar and pick up a man. She would then take a concoction that would appear to stop her heart and they would blame her death on the man. After she was buried, they would dig her up and give her a potion that would revive her.

The State introduced evidence that on the night of July 15, Jessica went to a bar and solicited Jimmy Herrod for a sexual encounter. Herrod testified that while they were in the bar, Myers came in and asked Jessica to come outside with him. Jessica returned to the bar after a half

[1] In this movie one of the main characters takes a drug that apparently stops his heart and is then injected with a substance that reawakens him.

an hour, and she and Herrod left the bar to have sex. But Jessica surreptitiously called 9-1-1 to report a rape in progress. At this point, Jessica began vomiting, and Herrod decided not to pursue the sexual encounter. When the police arrived, they questioned Herrod and released him after determining that he had not done anything. Jessica told police that she knew her husband was cheating on her and that she wanted to pay him back. The police blamed her illness on her drinking.

After the murder, Baber told police that this encounter was the first attempt to fake Jessica's death. He testified that when Jessica left the bar with Myers, she drank the potion that was supposed to simulate death. But Jessica apparently vomited the poison.

A few days later, Myers reported that Jessica was missing. Myers told police that Jessica left the apartment to find some food and took some money with her. Myers said that he was drinking and watching a movie and that he had passed out. He woke at 8 a.m. because he heard his son crying, changed him, and went back to sleep. He did not see Jessica at this point and did not look for her. He woke again in the afternoon when Jessica's mother called to speak with Jessica. He told her that he had not seen Jessica. Eventually, Myers called the police and reported that Jessica was missing. Though questioned about it, he denied a relationship with Benton.

The police searched Myers's apartment and found a torn up love letter from Myers to Benton, Jessica's journal, and documents containing information about the Federation. The police also interviewed Baber, and Baber told them he last saw Jessica at 1 a.m. on July 16. He denied being involved in her disappearance. Meanwhile, Myers, Baber, Jessica's aunt, Kristin Wadleigh,

and Jessica's mother put up missing posters and looked for Jessica around Tacoma. At trial, the State elicited that Baber appeared scared and that Myers had acted inappropriately by laughing and playing loud music.

Teddi Henkel, Jessica's friend, also helped Myers and Baber look for Jessica. After reporting Jessica missing, Myers continued to pursue his relationship with Sarah Benton. Henkel testified that Benton called Myers after they returned to Myers's apartment from looking for Jessica. Myers ended the conversation by telling Benton, "I love you." 7 RP (Oct. 19, 2004) at 1113. Benton, however, denied that Myers told her anything other than his wife was missing. In any case, Myers also researched bus and plane tickets from Las Vegas to Washington and purchased a plane ticket for Benton to return on July 19, 2003. Benton missed this flight.

On July 20, 2003, Tacoma Police Officer Paul Brown discovered Jessica's body in Myers's car. The car was located just off of Ruston Way. Jessica's body was in the back seat with a bungee cord wrapped around her neck. The cord was suspending her head and upper torso. She had been dead at least 48 hours, and the medical examiner determined the cause of death was strangulation. He found no evidence indicating that she had struggled with her murderer.

The contents of Jessica's purse were strewn over the car's hood. The police found some broken black zip ties under the car along with a button and some black string that matched Jessica's clothing. Her shirt was either cut or torn in a straight line. And she held an angel medallion with a broken chain in her hand.

After finding the body, the police re-interviewed Myers. When the body was discovered,

Myers was on the Army base, and the police requested that the Army prevent him from seeing any media coverage of the case. During questioning, the officers did not reveal any circumstances of Jessica's death. Nonetheless, Myers appeared to know that Jessica's body was in Tacoma. At one point during this interview, Myers admitted fighting with Jessica before she left, but he then sat back in his chair, smiled, and told the officers that his whole story was a lie and that they had no idea of the truth. When accused of complicity, Myers made what Detective Sergeant Barnes classified as "weak denials." 9 RP (Oct. 21, 2004) at 1434.

Meanwhile, the police also re-interviewed Baber. After receiving his *Miranda*[2] warnings, he confessed to Jessica's murder. He told the police that Jessica had voluntarily participated and that he and Jessica were trying to fake her death to avoid a Federation hit. According to Baber, he was going to strangle her, give her a potion that would stop her heart, and then give her another concoction to restart her heart. Initially, he and Jessica tried to use zip ties, but the zip ties broke. So they drove around looking for more zip ties and eventually purchased the bungee cord. Baber then strangled Jessica at her insistence.

Baber's initial confession also implicated others. Baber said that Myers was involved in planning the murder, though not the actual murder. But this portion of the confession was redacted for trial. In addition, after Jessica's death, Baber told police that Myers put Baber on the

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

phone with Benton. According to Baber, Benton then asked if "it was done" and if he was sure it was done, and Baber replied "yeah." 8 RP (Oct. 20, 2004) at 1363. Myers's name was redacted out of this part of Baber's confession when it was introduced at trial, but the jury did hear Benton's name.

The State filed an information charging both Myers and Baber with one count of first degree murder and one count of conspiracy to commit first degree murder. Myers moved to sever his trial on the grounds that Baber's initial statement to police implicated him. The trial court denied the motion to sever, and ordered the parties to redact Baber's statement so that the statement did not implicate Myers.

The trial court held a CrR 3.5 suppression hearing and ruled that Myers's and Baber's statements to police were voluntary and that both were properly given *Miranda* warnings. Accordingly, the trial court ruled the statements were admissible. But the trial court granted Myers's motion to exclude officers' testimony regarding Myers's credibility during his interview.

Myers again moved to sever the trials and to disqualify Ann Stenberg, Baber's defense attorney, because she had hired the former charging deputy prosecutor, Barbara Corey,[3] to work in her firm. The trial court denied the motion to sever and the motion to disqualify Stenberg after satisfying itself that Corey had transmitted no confidences to Stenberg or Baber's defense team. The court also ordered Stenberg to follow screening procedures and to file a weekly affidavit of compliance. The court denied the motion to sever because Corey had been directed not to have any contact with Baber or Baber's attorneys.

[3] Barbara Corey was known as Barbara Corey-Boulet while she worked with the prosecutor's office.

Myers next moved to exclude entries from Jessica's journal. The State and Baber sought to introduce the journal as relevant to Jessica's state of mind. The trial court granted these motions in part because the jury could infer from Myers's possession of the journal that he knew of Jessica's state of mind and therefore it was relevant to his motive. The trial court excluded portions of Jessica's journal that were either remote or not relevant to Myers's motive.

The trial began on October 7, 2004. During trial, Myers notified the trial court that it appeared that the defendants were offering irreconcilable defenses and that a severance motion would be forthcoming. On October 20, before Baber's initial confession was given to the jury, Myers renewed his motion to sever on the grounds that Baber's statement was not correctly redacted. The trial court denied the motion.

During the trial, Detective Sergeant Barnes testified that Myers made "weak denials" when officers accused him of murdering his wife. 9 RP at 1434. When the prosecutor tried to restate the question, Barnes repeated the statement. The trial court sustained a defense objection both times Barnes use the phrase "weak denials" and struck both questions and answers. 9 RP at 1434, 1441, 1469.

At the close of the State's evidence, Myers moved to dismiss the conspiracy count for insufficient evidence. The trial court denied the motion.

Baber then presented his case, and changed his story. He testified that the plan was to take a picture of Jessica with the cords in place making it look like a murder. Baber did not think they were actually going to strangle Jessica; he believed they were going to give her the same drug that she had vomited after the first attempt and then resurrect her. Myers put the bungee

cord around Jessica's throat, and Baber was shocked when Myers actually strangled her. Baber then testified that Myers threatened him, his girlfriend, and his family. Because he was scared, he lied to police and confessed to the murder himself.

During his testimony, he sought to introduce a cassette recording of a Federation meeting. The trial court admitted the tape, subject to Baber identifying the voices, on the theory that it was relevant to Baber's belief in the Federation and whether he intended only to fake Jessica's death or actually kill her.

After Baber testified and changed his story, the State moved to admit the redacted portions of his initial statement inculpating Myers. In a somewhat ambiguous exchange, Myers's counsel indicated that, "[if] the Court is to allow this, we believe it can't be repaired. We're going to move for a mistrial, and we also renew our motions for a severance." 11 RP (Oct. 26, 2004) at 1927. The trial court ultimately denied the motion to admit the redacted portions of the statement but did not address the renewed motion for severance. The jury, therefore, never heard the redacted portions of Baber's initial confession inculpating Myers.

After the close of the evidence, the State offered an instruction on accomplice liability. Myers objected on the grounds that the instruction was misleading and incorrect. The trial court gave the State's instruction over the defendant's objection.

The jury convicted Myers of first degree murder and conspiracy to commit first degree murder. Baber, on the other hand, was convicted of first degree manslaughter and was acquitted on both the first degree murder and conspiracy charges. Myers moved to vacate the conspiracy conviction because Baber was acquitted and for insufficient evidence. The trial court denied both

motions. The trial court then sentenced Myers to 320 months for the first degree murder conviction, 180 months for the conspiracy conviction, and ran the sentences consecutively.

ANALYSIS

I. Severance

Myers argues that the trial court either erred in not severing his case from his codefendant Baber's case before trial or in not granting Myers's severance motion renewed during trial. Specifically, he asserts that (1) admitting Baber's redacted statement violated CrR 4.4(c)(1), (2) the joint trial abridged his confrontation rights, and (3) his and Baber's defenses were so mutually antagonistic that they were irreconcilable. The State responds that Myers waived his right to appeal on the basis of irreconcilable defenses, that, in any case, the defenses were not irreconcilable and Baber's decision to testify at trial cured any violation of Myers's confrontation rights.

We review a trial court's denial of a motion to sever for abuse of discretion. *State v. Lane*, 56 Wn. App. 286, 298, 786 P.2d 277 (1989) (citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982)), *cert. denied sub nom.*, *Frazier v. Washington*, 459 U.S. 1211 (1983). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426 (citing *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997).

Myers first argues that the trial court erred by not granting his pre-trial motion to sever based on CrR 4.4(c)(1). That provision, which is phrased in mandatory language, states that:

> A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him *shall* be

> granted unless:
>
> (i) the prosecuting attorney elects not to offer the statement in the case in chief;
>
> (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

CrR 4.4(c)(1) (emphasis added). Myers argues that the trial court should have granted his pretrial motion for severance because the State introduced Baber's confession without removing all references to him. Myers notes that Baber's redacted statement contained pronouns that the jury could arguably have attributed to Myers, thereby prejudicing Myers and violating CrR 4.4(c)(1).

The prejudice this rule addresses is the admission of a codefendant's hearsay statement without the protection of cross-examination. *State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991) (noting that CrR 4.4(c) was adopted to avoid the constitutional confrontation problem). In *Crawford v. Washington*, the Supreme Court's reaffirmed that cross-examination was the key "indicium of reliability" to safeguard a criminal defendant's constitutional rights. *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Myers does not have the right to exclude his codefendant's in-court testimony simply because it incriminates him. Here, because Baber testified and Myers had the opportunity to cross-examine him, Myers suffered no improper prejudice. Therefore, we need not address whether the trial court properly redacted Baber's confession under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). And, similarly, there is no *Crawford* problem because Baber was subject to cross-examination when he took the stand.

Myers next argues that the trial court erred in not granting a discretionary severance motion under CrR 4.4(c)(2), which provides that a trial court "should" grant a severance

whenever it is necessary to the "fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(i), (ii). He argues that his defense was irreconcilable with Baber's.

Our state does not favor separate trials. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). The defendant has the burden of showing specific prejudice outweighing judicial economy concerns. *Hoffman*, 116 Wn.2d at 74; *Grisby*, 97 Wn.2d at 507. Specific prejudice may be demonstrated by:

> (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting *United States v. Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985)), *review denied*, 128 Wn.2d 1025 (1996). The mere antagonism between defenses or the desire by one defendant to exculpate himself by inculpating a codefendant is not sufficient to compel separate trials. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004). The defendant must show that the defenses are mutually exclusive to the extent that one must be believed if the other is disbelieved. *State v. Medina*, 112 Wn. App. 40, 53, 48 P.3d 1005 (2002). Alternatively, the defendant must demonstrate that the conflict is so prejudicial that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. *Hoffman*, 116 Wn. at 74. This second test is not met because Baber was convicted only of manslaughter while Myers was convicted of first degree murder and conspiracy. Thus, we examine whether, in order to believe Baber's defense, the jury

had to disbelieve Myers.

We rarely overturn a trial court's denial of a motion to sever on the basis of mutually exclusive defenses, even when one defendant tries to blame the other. In *Grisby*, our Supreme Court held that where two men killed a man during a drug dispute and both claimed that the other was the actual killer, the defense was not inherently antagonistic. *Grisby*, 97 Wn.2d at 508. In *State v. Larry*, Division One determined that two defendants did not have irreconcilable defenses where one defendant blamed the other, and the other defendant blamed a third party. *State v. Larry*, 108 Wn. App. 894, 911-12, 34 P.3d 241 (2001). In *Medina*, Division One found that where two defendants were both part of a group of people assaulting the victim and both denied actually hitting him, the defenses were not irreconcilable. *Medina*, 112 Wn. App. at 53-54.

Here, Baber's defense was that he did not believe that Jessica was actually going to die. He presented two versions of this defense. His first version, presented in his initial confession, was that he strangled Jessica at her request in order to avoid a Federation hit and that he believed he could then resurrect her. His second version, presented at trial, was that he thought Myers and Jessica were going to fake the strangulation and that he was surprised when Myers actually strangled her. He therefore argued that he lacked the requisite intent to commit murder. Myers's defense, on the other hand, was a general denial.

The State argues that the jury could have believed Baber and still have acquitted Myers because there was no physical evidence linking Myers to the crime. Br. of Resp't at 24. The State's position would be correct if Baber had stuck to his original confession. The jury may have believed that Baber lacked the requisite intent because he thought he could bring Jessica back to

life himself, that Jessica participated in faking her own death, and that Myers was not involved.

And this argument is compelling even though Baber's second version of events was irreconcilable with Myers's defense. If the jury were to accept Baber's second version of events—that Myers actually killed her while Baber watched—they would necessarily have to disbelieve Myers's story. But the jury was entitled to completely disbelieve Baber's trial testimony as an attempt to shift the blame. The jury may still have believed Baber's initial confession that Baber killed Jessica at Jessica's request. In that case, the jury could acquit Baber because he lacked the requisite mens rea for first degree murder and acquit Myers because they believed that Myers was not present or involved.

Because the jury could still accept Myers's defense, the defenses are not mutually exclusive to the extent that one must be believed if the other is disbelieved. *Medina*, 112 Wn. App. at 53. Nor are they in such conflict that the jury would infer from the conflict that both were guilty. *Hoffman*, 116 Wn. at 74.

Myers relies on a Fifth Circuit federal case, *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973). In that case, two defendants were charged with counterfeiting money. *Johnson*, 478 F.2d at 1130. Johnson's defense was that he was not present. *Johnson*, 478 F.2d at 1131-32. Smith confessed to the crime but argued he lacked the requisite mental state because he believed he was an informer and because the third person who accepted the bills knew they were counterfeit. *Johnson*, 478 F.2d at 1132. The court held that Johnson's trial should have been severed because Smith's counsel took every opportunity to implicate Johnson, and Smith was the government's best witness against Johnson. *Johnson*, 478 F.2d at 1133.

Federal courts use a slightly different test for determining when a defense is so mutually exclusive as to require severance.[4] The Ninth Circuit defines defenses as mutually exclusive when the core of the codefendant's defense is so irreconcilable with the core of the defendant's defense that "acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." *United States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997) (citing *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996), *cert. denied*, 519 U.S. 1132 (1997)), *cert. denied sub nom.*, *Mesa v. United States*, 522 U.S. 1097 (1998). The Ninth Circuit is concerned that trying a codefendant with a mutually exclusive defense has the effect of creating a second prosecutor against defendant, in which the codefendant's counsel does everything possible to convict the defendant. *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir. 1991). As the Ninth Circuit noted, "[c]ross-examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant." *Tootick*, 952 F.2d at 1082.

Assuming we find the Ninth Circuit's reasoning persuasive, the federal test does not avail Myers either. The core of Baber's defense, that he lacked intent, did not preclude the jury from acquitting Myers, who generally denied he was present or involved. As indicated above, the jury might have believed Baber's initial confession and that Myers was not involved. Therefore, the trial court did not abuse its discretion in denying Myers's motions to sever.

II. Codefendant's Counsel

[4] Actually, Washington's approach is also derived from the federal courts, just not the Ninth Circuit. The test in *Hoffman* comes from *State v. Grisby*, which was citing *United States v. Davis*, 623 F.2d 188, 194-95 (1st Cir. 1980). *Grisby*, 97 Wn.2d at 508. The test from *Medina* originally appeared in *Lane*, 56 Wn. App. at 298, where the court cited *United States v. Bovain*, 708 F.2d 606, 610 (11th Cir), *cert. denied sub nom*., *Brown v. United States*, 464 U.S. 898, *Rickett v. United States*, 464 U.S. 997, *Finch v. United States*, 464 U.S. 1018 (1983).

Myers makes a related argument that he was denied a fair trial by Baber's counsel's misconduct during the trial. First, he suggests that Baber's counsel tried to elicit improper hearsay and opinion evidence. Second, he asserts that Baber's counsel improperly commented on Myers's credibility and on his demeanor during the trial.

Division One has addressed whether a codefendant's counsel may deny a defendant a fair trial. *State v. Dickerson*, 69 Wn. App. 744, 850 P.2d 1366, *review denied sub nom.*, *State v. Bordenik*, 122 Wn.2d 1009 (1993). The *Dickerson* court indicated that a codefendant's counsel's comment on a defendant's failure to testify "can, under certain circumstances, deprive a nontestifying defendant of a fair trial." *Dickerson*, 69 Wn. App. at 747. The court then held it would apply the standard for evaluating prosecutorial misconduct. *Dickerson*, 69 Wn. App. at 747. For authority, the court relied on a series of federal cases indicating that a codefendant's counsel's comment on a defendant's Fifth Amendment right could be reversible error. *Dickerson*, 68 Wn. App. at 747 n.4 (citing *United States v. Moreno-Nunez*, 595 F.2d 1186 (9th Cir. 1979); *United States v. De La Cruz Bellinger*, 422 F.2d 723 (9th Cir.), *cert. denied*, 398 U.S. 942 (1970); *De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

Myers argues that we should apply the test for prosecutorial misconduct to Baber's counsel's alleged misconduct in this case. Assuming, without deciding, that it is appropriate for us to apply the same standards to a defense counsel as to a prosecutor and that *Dickerson* applies to misconduct other than a comment on a defendant's right to silence, the misconduct in this case does not merit reversal.

To establish prosecutorial misconduct, the defendant bears the burden of establishing that

the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). If the defendant proves the conduct was improper, the misconduct still does not constitute prejudicial error unless we determine there is a substantial likelihood that the misconduct affected the jury's verdict. *Stenson*, 132 Wn.2d at 718-19. If the defendant fails to object, the misconduct is reversible only if the conduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995).

Myers first argues that Baber's counsel asked a series of improper questions during the State's case in chief. But Myers also concedes that the trial court sustained objections to all these improper questions. Myers did not move for a mistrial after these questions, and the trial court did not fail to give any requested curative instructions. Assuming that the questions were inappropriate, Myers cannot demonstrate that there was a substantial likelihood that these questions affected the jury's verdict because the objections were all sustained.

Myers next argues that Baber's counsel committed misconduct during closing arguments by commenting on Myers's demeanor during trial. It is generally improper to comment on the defendant's demeanor and invite the jury to draw a negative inference about the defendant's character. *State v. Klok*, 99 Wn. App. 81, 85, 992 P.2d 1039, *review denied*, 141 Wn.2d 1005 (2000). But the prejudice from such a comment is curable by a proper instruction. *State v. Smith*, 144 Wn.2d 665, 679-80, 30 P.3d 1245 (2001), *superseded on other grounds by State v. Varga*, 151 Wn.2d 179, 183, 86 P.3d 139 (2004).

Baber's counsel pointed out that Myers's demeanor during the trial was inappropriate and that he showed no remorse or guilt during the trial. Baber's counsel then told the jury, "I suggest to you, just having observed him over these four weeks and one day that you have learned all you need to know about Jeremy Myers." 14 RP (Nov. 1, 2004) at 2436. Myers did not object or seek a curative instruction. And the trial court properly instructed the jury that the attorney's comments during closing were not evidence. In this context, we cannot say that this statement, though improper, was so flagrant and ill-intentioned that a new trial is warranted. *Gentry*, 125 Wn.2d at 596. Nor can we say, given the overwhelming evidence against Myers, that Baber's counsel's comments affected the outcome.

Myers also suggests that these same comments constituted a comment on Myers's exercise of his right to silence because Baber's counsel asked the jury to compare Baber's conduct with Myers's conduct. But nothing in this comment indicated that Baber's counsel was asking the jury to note that Myers did not testify; the argument called attention specifically to Myers's demeanor in court and his general lack of remorse. Although there may be situations in which asking the jury to compare the conduct of two defendants may be a comment on one defendant's right to silence, comparing Myers's lack of remorse to Baber's regrets is not such a situation. Accordingly, this was not a comment on Myers's right to remain silent. Myers could have displayed remorse without testifying.

Myers next asserts that Baber's counsel committed misconduct by telling the jury that Myers was a "pathological liar." 14 RP at 2412-13. A prosecutor may not give his personal opinion of the defendant's guilt or veracity. *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558

(1969), *rev'd on other grounds by Adams v. Washington*, 403 U.S. 947 (1971). But a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. *In re Davis*, 152 Wn.2d at 716. For example, a prosecutor may refer to the defendant as a liar without expressing personal opinion if referring to a specific portion of evidence that clearly demonstrates the defendant actually lied. *Adams*, 76 Wn.2d at 660.

Here, Baber's counsel called Myers a pathological liar and then listed three specific instances in which the record supported an inference that Myers had lied. This included an incident during a police interview in which Myers sat back, smiled, and told police that his whole story to police was a lie and the police could not discern the truth. In the context of this record, while Baber's counsel probably expressed herself too strongly in calling Myers a pathological liar, Myers's conduct does suggest that he derived some pleasure from lying to police. In any case, the record supports the argument that Myers was a liar. Moreover, as noted above, the trial court properly instructed the jury not to consider the attorney's remarks as evidence. The prejudice from adding the adjective pathological is insufficient to justify reversal.

Even if Baber's counsel's conduct was improper, Myers cannot show a reasonable probability that the misconduct affected the trial's outcome. *Stenson*, 132 Wn.2d at 719. Here, the State introduced overwhelming evidence that Myers was involved in the death of his wife. Baber testified that he watched Myers strangle Jessica. Myers's neighbors overheard a man in Myers's apartment saying that he wanted to kill Jessica. Myers actually solicited Amanda Elzner to kill Jessica in exchange for $10,000 dollars from Jessica's life insurance policy and sought out hit men on the internet. Myers was involved in an extramarital affair with Sarah Benton and had

purchased a ticket for her to fly back to Washington shortly after the murder, and Benton knew of Jessica's death before police discovered her body. Based on this record and even applying the same standard of conduct as we would to a prosecutor, we cannot say that any misconduct by Baber's attorney affected the outcome.

III. Conflict of Interest

Myers next argues that the trial court erred in denying his motion for severance on the grounds that his codefendant's counsel hired former Pierce County prosecutor, Barbara Corey, who had charged Myers. He argues that this created a conflict of interest and denied him the appearance of fairness.

As noted above, in order for severance to be warranted, Myers must show that he suffered a specific prejudice that outweighs our concern for judicial economy. *Hoffman*, 116 Wn.2d at 74. He must therefore demonstrate that Corey's employment with his codefendant's counsel prejudiced him. Because he cannot demonstrate any prejudice, his argument has no merit.

Myers relies on *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). In *Stenger*, the elected Clark County Prosecuting Attorney had previously represented a defendant in connection with other criminal charges. *Stenger,* 111 Wn.2d at 518. After the prosecuting attorney was elected, Clark County charged the defendant with aggravated first degree murder and filed a notice of intent to seek the death penalty. *Stenger*, 111 Wn.2d at 518. The prosecuting attorney took part in Clark County's determination to seek the death penalty, which required that the prosecuting attorney have reason to believe there were no sufficient mitigating circumstances to merit leniency. *Stenger*, 111 Wn.2d at 519, 521-22. Because his former representation made the

prosecuting attorney privy to confidential information about the defendant's background, criminal background, and antisocial conduct, and because the prosecuting attorney made no effort to screen himself from the case, our Supreme Court disqualified the entire Clark County prosecuting attorney's office. *Stenger*, 111 Wn.2d 522-23.

But the court specifically noted that there is no persuasive reason to disqualify the prosecutor's office if the prosecuting attorney separates himself from the case, delegates full authority to a deputy, and scrupulously maintains a screen. *Stenger*, 111 Wn.2d at 522. And in even stronger language, the court stated:

> [W]here a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened . . . then the disqualification of the entire prosecuting attorney's office is neither necessary or wise.

Stenger, 111 Wn.2d at 522-23.

This case presents us with a situation more analogous to a disqualified deputy prosecuting attorney. Corey had personal information about the case from her representation of Pierce County and would be disqualified under rule of professional conduct 1.11. She was hired by Stenberg's law firm, not as the chief administrative officer, which would be analogous to the elected prosecuting attorney, but as another lawyer in the firm. Applying *Stenger*'s analysis to this case, then, so long as Corey was effectively screened, the disqualification of her firm was neither necessary nor wise. *Stenger*, 111 Wn.2d at 523.

And here, the trial court was scrupulous in making sure that Corey was effectively screened. The trial court held an evidentiary hearing, at which it determined that Corey passed no confidences to Stenberg. After consulting with the Washington Bar Association, Stenberg and

Corey volunteered several screening mechanisms including, locking the case files in a room inaccessible to Corey, prohibiting Corey's access to the computer network on which information related to the case might appear, holding all conversations about the case in a room where Corey could not overhear, requiring Corey to leave the office at 4 p.m. to prevent her from hearing discussions after court, and prohibiting Corey from answering any phones in case the caller was involved in the case. In addition, the trial court imposed an order requiring Corey not to discuss the case, requiring the members of Stenberg's law firm to not discuss the case with Corey, and requiring Corey to file a weekly affidavit of compliance with the screening and to immediately report any inadvertent contact with the case.

Myers provides no evidence that these screening mechanisms were ineffective during the trial. Accordingly, Myers demonstrated no prejudice justifying a separate trial.

Myers next asserts that allowing Stenberg to continue as Baber's counsel in a joint trial denied him an appearance of fairness. The appearance of fairness doctrine applies to judicial and quasi-judicial officers and seeks to prevent "'the evil of biased or a potentially interested judge or quasi-judicial decisionmaker.'" *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (quoting *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)), *cert denied*, 528 U.S. 922 (1999). A decision is quasi-judicial if it is adjudicatory in nature. *Finch*, 137 Wn.2d at 809. But a prosecutor's charging decision is not adjudicatory and therefore the doctrine does not apply. *Finch*, 137 Wn.2d at 810.

Corey's only involvement in this case was that she was the charging prosecutor. Because the appearance of fairness doctrine does not apply to a prosecutor's charging decisions, the

doctrine was not violated when Stenberg hired Corey. And Stenberg is not a quasi-judicial officer in the case against Myers; she is a zealous advocate for her client. Therefore, her association with Corey did not deny Myers the appearance of fairness. Thus, the trial court properly denied the motion to sever based on Ms. Corey's employment with Baber's counsel's firm.

IV. Confrontation Clause

Myers argues that his confrontation rights were violated because the trial court admitted Baber's testimonial hearsay statements. He further contends that because Baber did not present a common defense, cross-examination did not provide effective confrontation. Neither argument has merit.

The confrontation clause prohibits the admission of testimonial hearsay without an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 59. But "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9. As we have previously pointed out, once Baber took the stand, Myers had the opportunity to cross-examine Baber about his testimonial hearsay statements to police. And in fact, Myers impeached Baber's trial testimony with Baber's initial admissions.

Although Myers claims the trial court limited his cross-examination of Baber so that he was denied a full cross-examination, our examination of the record reveals that the trial court did not limit his cross-examination. At trial, Myers sought to have Baber go over his initial confession in which he admitted strangling Jessica. The trial court stated, "[y]ou indicated you were going to go through the statement. I don't know that's appropriate. We've got the

statement in already." 11 RP at 1888. Despite the observation, the trial court then allowed Myers to closely question Baber based on the transcript of his initial confession under the guise of allowing Baber to refresh his recollection. Thus, the trial court did not limit Myers's cross-examination of Baber.

Myers also claims that the trial court did not allow him to question Baber about the portions of Baber's original confession inculpating Myers that were redacted before trial. As Myers concedes, however, the trial court ruled that those portions were inadmissible on Myers's motion. Myers cannot now complain that the trial court erred in granting his motion. Myers made a tactical decision not to explore those areas of Baber's original confession and still had a full opportunity to cross-examine Baber.

Myers next argues that cross-examining of a codefendant during the codefendant's case is an inadequate substitute for being able to cross-examine the codefendant during the State's case in chief. Myers cites to *United States v. Brown*, 699 F.2d 585 (2d Cir. 1983). In *Brown*, the codefendant, Brown, gave a statement to police before trial inculpating both Bishop and Brown. *Brown*, 699 F.2d at 591. Brown took the stand, denied involvement, and then the State impeached him with his previous statement. *Brown*, 699 F.2d at 591. The court held that Bishop's cross-examination of Brown was "ineffective and fruitless." *Brown*, 699 F.2d at 592. But the basis of this ruling was that "it was unnecessary to bring Bishop's name into the questioning." *Brown*, 699 F.2d at 591-92. The court was concerned that the State was simply evading *Bruton*'s restriction on using codefendant's extrajudicial statements by introducing the portions implicating Bishop under the guise of impeachment. *Brown*, 699 F.2d at 592.

But here, unlike in *Brown*, the trial court redacted Baber's initial confession to remove references to Myers. And the trial court excluded those portions referencing Myers on Myers's motion. There is, therefore, no *Bruton* problem presented in this case and *Brown* does not apply. And Myers had a full and fair opportunity to cross-examine Baber about both statements. Once Baber appeared for cross-examination, the confrontation clause places no constraints at all on the use of his prior testimonial statements. *Crawford*, 541 U.S. at 59 n.9.

V. Audiotape

Myers next asserts that the trial court erred in admitting an audiotape containing the voices of Adam Dickamore, Bobby Zapata, Lloyd Norris, Jeremy Myers, Jessica Myers, and Baber. The tape purported to be a Federation induction meeting for Baber and Dickamore. Myers argues that the tape was inadmissible hearsay because only Baber testified. The trial court admitted it as relevant to Baber's state of mind and instructed the jury to consider it only for that purpose.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "'A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.'" *Perrett*, 86 Wn. App. at 319 (quoting *Havens*, 124 Wn.2d at 168). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless a hearsay exception applies. ER 802; *State v. Terrovona*,

105 Wn.2d 632, 637 n.1, 716 P.2d 295 (1986). But hearsay statements may be admitted to prove the statement's effect on the hearer's state of mind. *State v. Marintorres*, 93 Wn. App. 442, 449, 969 P.2d 501 (1999). When offered for this purpose, the statement is not actually hearsay because the statement is not offered to prove the truth of the matter asserted but as circumstantial evidence of the hearer's state of mind. Karl Tegland, 5B Washington Practice § 803.15, at 448-49 (4th ed. 1999). To be admissible on this theory, the hearer's state of mind must be relevant to an issue at trial. *Marintorres*, 93 Wn. App. at 449. Because of the potential prejudice of such statements, they must be accompanied by a limiting instruction. *State v. Parr*, 93 Wn.2d 95, 99, 606 P.2d 263 (1980).

Here, to prove Baber committed first degree murder, the State had to prove that he had the premeditated intent to cause the death of another person. RCW 9A.32.030(1)(a). Baber's theory of the case was that he did not have any intent to cause Jessica's death; he only intended to fake her death so the Federation would not kill her. The tape was relevant to establish that Baber reasonably believed that the Federation existed and that it was the type of organization that could place a hit on a person. If Baber's belief was reasonable, the jury could infer that Baber did not have a premeditated intent to kill Jessica; he only wanted to fake her death and save her. And because the trial court gave a proper limiting instruction directing the jury to consider the tape only for the purpose of determining Baber's state of mind, the trial court did not abuse its discretion in admitting the tape.

Nonetheless, Myers argues that Baber's counsel used the tape for the truth of the matter asserted in her closing argument when she referred to the tape. Myers cites to a federal case for

the proposition that it is prosecutorial misconduct to use evidence admitted under the state of mind exception as substantive evidence in a closing argument. *United States v. Sherlock*, 962 F.2d 1349, 1362 (9th Cir.), *cert. denied sub nom.*, *Charley v. United States*, 506 U.S. 958 (1992).

But Baber's counsel did not use the statements for an improper hearsay purpose. She noted that tape recorded a "group that talks about weaponry, violence, war, and the destruction of human beings." 14 RP at 2416-17. This is not an assertion that the Federation actually had weaponry or that its members actually did destroy human beings. Instead, she merely accurately described the contents of the tape as part of her argument that "young people are vulnerable to the influences around them. And this is what we have happening in Christopher Baber's mind." 14 RP at 2416. Therefore, Baber's counsel properly used the tape as evidence of Baber's state of mind.

VI. Jessica's Journal

Myers next argues that the trial court erred in admitting entries from Jessica's journal indicating that she had discovered Myers's relationship with Benton and fought with him over it. Br. of Appellant at 52. The State argues that the journal entries were admissible under ER 803(a)(3) as relevant to Jessica's state of mind.

Under ER 803(a)(3), a hearsay statement that reveals a declarant's then existing state of mind is admissible. But a murder victim's hearsay statement is relevant under the state of mind exception only when her state of mind is at issue, such as in cases involving claims of accident or self-defense. *State v. Powell*, 126 Wn.2d 244, 266, 893 P.2d 615 (1995); *State v. Cameron*, 100

Wn.2d 520, 531, 674 P.2d 650 (1983); *Parr*, 93 Wn.2d at 103.

In *Powell*, a husband was accused of killing his wife. *Powell*, 126 Wn.2d at 248. The trial court allowed several friends and family to testify about domestic violence incidents the victim had related to them. *Powell*, 126 Wn.2d at 249-53. The court determined that while these statements were relevant to the victim's state of mind, they were still inadmissible because the victim's state of mind was not at issue. *Powell*, 126 Wn.2d at 266 (citing *Parr*, 93 Wn.2d at 103.)

The basis of this distinction is relevance. In *Parr*, the court determined that a victim's statement to a third party revealing the victim's state of mind is "ordinarily not relevant." *Parr*, 93 Wn.2d at 103. Thus, we read *Parr* for the proposition that if there is some way that the victim's state of mind is relevant to an issue in the case, it is admissible.

Here, the trial court admitted the following diary entry from July 14, two days before the murder:

> Dear Journal, I have to tell you I almost lost my husband yesterday. I all of a sudden blew up, lost control of my temper. I found out that my husband is in love with Sarah. I found a love note to her in the open. I blew up and I somewhat regret that.
>
> A part of me wants to leave, then another part of me says stay. I'm ignoring the part of me that says to leave. I won't leave him unless he asks me to.
>
> He wants me to wait at least two days before I take Alex and go. I don't know if that is even going to happen now. I can't loss (sic) him. He is my world along with Alex."

4 RP (Oct. 13, 2004) at 633-34. The trial court noted that the journal was found in Myers's possession and control in a locked briefcase. The trial court reasoned that the jury could infer that Myers had reviewed the journal and was therefore aware of Jessica's state of mind. Because

knowing Jessica's state of mind may have contributed to Myers's motive, it was relevant. In keeping with this theory, the court decided to admit those portions of the journal relevant to Jessica's state of mind but redacted other hearsay statements.

Having determined that the jury could infer that Myers was aware of Jessica's state of mind, the trial court did not abuse its discretion in admitting evidence relating to Jessica's state of mind. Evidence of a defendant's motive is relevant in a homicide prosecution. *Stenson*, 132 Wn.2d at 702. Jessica's anger and the fact that she was contemplating taking Alex was relevant to Myers's motive, so long as there was evidence that Myers was aware of it. And Myers had the journal in his possession, giving rise to an inference that Myers was aware of Jessica's exact journal entry.

At most, the trial court may have erred in admitting this entire journal entry. Arguably, the portion of the entry indicating that Myers wanted her to wait two days is not relevant to her state of mind; it is merely recounting Myers's factual statement and, therefore, inadmissible hearsay. Assuming it was an error not to redact that sentence, the error would be harmless.

Although the general rule is that evidentiary rules are subject to ordinary harmless error analysis, "when an error, such as improperly admitting hearsay evidence, deprives the defendant of the right to confrontation," the State must show that the error was harmless beyond a reasonable doubt. *Powell*, 126 Wn.2d at 267; *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003) (indicating that under constitutional error analysis, the State bears the burden of demonstrating the error was harmless beyond a reasonable doubt). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily

leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004).

Here, as we indicated above, the State introduced overwhelming evidence that Myers was involved in his wife's death. Even without knowing that Myers asked Jessica to stay two days and that she was killed two days later, there was overwhelming evidence that Myers was guilty. Therefore the error, if any, was harmless.

VII. Comment on Credibility

Myers next argues that Detective Sergeant Barnes improperly commented on Myers's credibility by testifying that Myers issued "weak denials" when accused of murdering Jessica. Br. of Appellant at 55; 9 RP at 1434. Because the trial court struck the question that elicited Barnes's testimony, as well as his answer, Myers is presumably appealing the trial court's denial of his mistrial motion.

We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). We find abuse when "'no reasonable judge would have reached the same conclusion.'" *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial will cure an error. *Johnson*, 124 Wn.2d at 76. In evaluating an irregularity at trial, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Hopson*, 113 Wn.2d at 284.

Generally, a witness may not offer an opinion regarding the defendant's veracity. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Opinion evidence is testimony based on one's belief rather than on direct knowledge. *Demery*, 144 Wn.2d at 760. Such opinion evidence is unfairly prejudicial because it invades the jury's exclusive province. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Washington courts have declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *Demery*, 144 Wn.2d at 760.

Here, the prosecutor asked Detective Sergeant Barnes what Myers said after being accused of Jessica's murder. Detective Sergeant Barnes replied that Myers "made some weak denials and told me that he did not kill his wife and told me he would never harm Jessica." 9 RP at 1434. Myers immediately objected. After an unrecorded sidebar, the prosecutor asked Detective Sergeant Barnes again what Myers said and Detective Sergeant Barnes stated: "[h]e denied that and made some weak denials and said he did not --". 9 RP at 1435. Myers again objected and moved for a mistrial. The trial court denied the motion, noting that because the witness could not hear the sidebar, the prosecutor did not have a chance to warn the detective not to use the phrase "weak denial." 9 RP at 1441. The trial court then instructed the jury to strike the last two questions and answers.

We presume that the jury follows all instructions given. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Here, assuming that the phrase "weak denials" was a comment on the defendant's veracity, the defendant was not so prejudiced that a timely instruction could not have cured the prejudice. Therefore, the trial court properly denied Myers's motion for a mistrial.

VIII. Prosecutorial Misconduct

Myers next argues that the prosecutor committed misconduct that deprived him of a fair trial by referring to Baber's redacted initial confession as incomplete and therefore allowing the jury to infer that Baber had implicated Myers in that statement. The prosecutor asked Detective Zaro during Baber's case whether the transcript that Zaro was looking at was the complete transcript. Myers objected and moved for a mistrial. The trial court agreed with Myers that the question was improper, but it denied a mistrial and gave a curative instruction directing the jury to

disregard the question and remark. Accordingly, we construe Myers's appeal to argue that the trial court erred in denying a mistrial and that its curative instruction was inadequate.

As we noted above, we review the trial court's denial of a mistrial for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). We keep in mind that the trial court is best suited to judge the prejudice of a particular statement. *Lewis*, 130 Wn.2d at 707. The trial court can consider giving an instruction to cure any prejudice. *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983). And we presume that the jury follows the trial court's instructions. *Johnson*, 124 Wn.2d at 77.

Even assuming error, we hold that, on this record, the fact that the jury heard that Baber's complete initial confession was not admitted into evidence was not so prejudicial that a new trial was warranted. Despite Myers's assertion on appeal, the prosecutor's question did not necessarily imply that the redacted portions of the statement implicated Myers. Before this question, Baber had taken the stand to repudiate his initial confession and accuse Myers as the killer. The jury may well have concluded that the excluded portions further implicated Baber. Myers, in fact, impeached Baber at length with the transcript of his initial confession, as did the State. In this context, the prejudice, if any, was minimal.

And given this context, the trial court's instruction to disregard was more than sufficient to cure any prejudice. The trial court was better suited to judge whether the question so prejudiced Myers that a mistrial was warranted. On this record, the trial court did not abuse its discretion.

IX. Sufficiency of the Evidence

Myers argues that the State failed to produce sufficient evidence to support his conviction for conspiracy to commit first degree murder. Myers specifically asserts that there was no evidence that he entered into an agreement with anyone to kill his wife.

We review the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, we draw all reasonable inferences in the State's favor of the State and interpret them most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

The State has the burden of proving all elements of a crime beyond a reasonable doubt. *State v. McCullum,* 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). A person is guilty of criminal conspiracy if, with the intent to commit a crime, he agrees with one or more persons to engage in or cause the performance of such conduct and any member of the conspiracy takes a substantial step in pursuance of the agreement. RCW 9A.28.040(1). It is not a defense that the person with whom the defendant is alleged to have conspired has not been prosecuted or convicted or has been convicted of a different offense. RCW 9A.28.040(2)(a)-(b).

The State must show an actual, rather than feigned, agreement with at least one other

person to prove conspiracy. *State v. Pacheco*, 125 Wn.2d 150, 159, 882 P.2d 183 (1994). The State does not need to show a formal agreement. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). And the conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Barnes*, 85 Wn. App. at 664. This proof may be circumstantial. *State v. Israel*, 113 Wn. App. 243, 284, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003).

Here, taking all inferences in favor of the State, there was sufficient evidence to prove Myers entered into an agreement to kill Jessica. The State introduced evidence that Myers searched the internet for "hit men wanted." 2 RP at 215. In addition, Myers offered Amanda Elzner $10,000 dollars to help him kill Jessica. RP 660. And Myers's neighbors overheard a male voice telling another man that he wanted to "fucking kill her." 6 RP at 1022. The jury may infer from this evidence that Myers was looking for a partner to help him kill his wife.

Further, the jury may have inferred that Myers entered into a conspiracy with Sarah Benton or Baber.[5] The day after the murder, but before Jessica's body was found, Benton asked

[5] Myers alleges that the charging instruments alleged only that Myers conspired with Benton, not any other party. But as the State correctly notes, the charging instrument alleged that Myers agreed with "one or more persons." Clerk's Papers (CP) at 2.

that Baber assure her that it was done, implying she knew that the murder was going to happen. Myers purchased tickets for Benton to fly back to Washington the weekend after the murder, and she told detectives, again before the police found Jessica's body, that she was coming back to attend a funeral for a girl named Jessica. Although Benton denied being part of a conspiracy, the jury may have disbelieved her and inferred that Myers and Benton plotted to kill Jessica so that Myers could be with Benton and that Myers took the substantial step of actually killing her.

In any case, a reasonable jury may also have determined that Myers conspired with Baber. Myers was looking for a person to help him kill Jessica and, two days after Baber came back from Ohio, she was dead. Moreover, Baber admitted that Myers and he agreed to fake Jessica's death. In fact, Baber testified that he took part in the scheme to poison Jessica to death the day before her murder. A reasonable juror may have concluded that Baber knew that Myers was going to kill her and that he agreed to help. While the jury may have not convicted Baber of conspiracy, the statute indicates that it is no defense that the other conspirator was not convicted.

X. Inconsistent Verdict

Myers next asserts that because Baber was acquitted of conspiracy, Baber's verdict is inconsistent with Myers's verdict and the trial court should have granted Myers's motion to vacate his conspiracy conviction.

A motion to vacate judgment presents a question of law. *State v. Price*, 59 Wn.2d 788, 791-92, 370 P.2d 979 (1962). We review questions of law de novo. *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

Myers relies on *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1983). In *Valladares*,

the jury convicted Valladares of conspiracy to deliver a controlled substance. *Valladares*, 99 Wn.2d at 670. The sole alleged coconspirator, on the other hand, was acquitted. *Valladares*, 99 Wn.2d at 671. The court specifically noted that Valladares was not charged with conspiring with other unnamed coconspirators. *Valladares*, 99 Wn.2d at 671. The court held that the legislature did not intend RCW 9A.28.040(2)(d) to mean that an inconsistent verdict of a sole alleged coconspirator was a not a defense to criminal conspiracy. *Valladares*, 99 Wn.2d at 671. The court therefore reversed Valladares's conspiracy conviction. *Valladares*, 99 Wn.2d at 672.

We hold that *Valladares* is distinguishable and inapplicable because the information in this case did not charge Myers with conspiracy with a specific person[6] but, rather, with "one or more persons." Clerk's Papers (CP) at 2. The trial court's instructions, to which Myers did not object, similarly allowed the jury to convict Myers if he agreed with "one or more persons." CP at 226. Thus, the jury was not compelled to find a conspiracy between only Baber and Myers. It is therefore possible that this verdict was not inconsistent because the jury may have determined that Myers conspired with Benton. Because the evidence is sufficient to support that finding, Myers's conviction is not inconsistent with Baber's acquittal. Although, as Myers pointed out at oral argument, the State's theory in its closing was that Baber and Myers conspired, the jury was entitled to evaluate all the evidence, including evidence that Benton may have been involved.

The State also makes a compelling argument that because inconsistent verdicts do not ordinarily justify vacating a guilty verdict, we should consider *Valladares* no longer good law in light of *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988), in which our Supreme Court adopted

[6] It is constitutionally permissible for the State to charge conspiracy without naming the specific conspirators. *State v. Brown*, 45 Wn. App. 571, 577, 726 P.2d 60 (1986).

the federal rule that where there is sufficient evidence to support a guilty verdict, the court will not reverse on that grounds if it is inconsistent with an acquittal on another count. *Ng*, 110 Wn.2d at 48. We do not address whether *Valladares* has been implicitly overruled because we find it distinguishable.

XI. Instructions

Myers next argues that the trial court's instruction on complicity was not a correct statement of the law and was a comment on the evidence. To a large degree, this argument is simply an extension of Myers's complaint that there were inconsistent verdicts. In essence, Myers argues that the instruction was improper because it allowed the jury to convict Myers of conspiracy without convicting Baber.

We review the adequacy of jury instructions de novo. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), *cert. denied*, 538 U.S. 945 (2003). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The specific language of an instruction is left to the court's discretion, and we review it for abuse of discretion. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

Here, the trial judge instructed the jury that:

> A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

CP at 202. This instruction is an accurate statement of law because it is a verbatim reproduction of RCW 9A.08.020(6). It also in accords with RCW 9A.28.040(2)(a)-(c), which provides that it is not a defense to conspiracy that a coconspirator has not been prosecuted, has been convicted of a different offense, or is not amenable to justice.

And the evidence supported this instruction. The State charged Myers with conspiracy with one or more persons and, as indicated above, could have found that Myers conspired with Baber or Sarah Benton. Because the trial court gave lesser included offenses, the jury faced the possible situation in which it might find Baber guilty of a lesser offense than Myers. Therefore, it was appropriate to inform the jury that it did not have to convict Myers and Baber of the same criminal offense.

The evidence introduced at trial also supported a finding that Benton was involved in the murder. She was not charged or prosecuted with the offense, and she testified under immunity. Accordingly, the instruction properly instructed the jury that her position in the case did not limit whether it found Myers guilty.

Myers argues nonetheless that the instruction constituted a comment on the evidence because by including the phrase "or has an immunity to prosecution" the jury might infer that the trial court believed that Benton was involved in the conspiracy. CP at 202. The trial court may

not comment on the evidence presented at trial. Wash. Const. art. IV § 16. The trial court comments on the evidence if it expresses its attitude toward the merits of the case or its evaluation relative to a disputed issue. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

Here, the instruction did not express an opinion or an attitude as to whether the trial court believed that Benton was involved in the murder. Instead, the trial court, in neutral terms, informed the jury of the legal consequence of Benton's immunity. In this case, the jury did not need to consider Benton's immunity deal in determining Myers's guilt. Therefore, there was no error.

XII. Cumulative Error

Last, Myers argues that if none of the individual alleged errors warranted reversal, the combination of errors denied him a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of errors of such magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332. Given the overwhelming evidence against Myers discussed above, any errors were not of such magnitude that they denied him a right to a fair trial.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Hunt, J.

Van Deren, A.C.J.